

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

Cellular Priority Access for
National Security and Emergency
Preparedness Telecommunications

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Petition for Rulemaking
of the
National Communications System

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SUMMARY

In this proceeding, the Secretary of Defense, Executive Agent of the National Communications System, urges the commission to adopt rules to provide priority access to cellular spectrum for National Security/Emergency Preparedness (NS/EP) responsiveness. The petition seeks establishment of the Cellular Priority Access Service (CPAS).

Use of cellular technology is rapidly increasing among those whose responsibilities include immediate response to emergencies and subsequent recovery efforts. Cellular usage by the public without NS/EP responsibilities in emergency situations leads to congestion in the cellular networks such that usage by those with NS/EP responsibilities is severely curtailed or made impossible. Emergencies such the explosions in Oklahoma City and at the World Trade Center as well as recent earthquakes and hurricanes have demonstrated this difficulty.

The Commission has ample authority to adopt such rules. One need only look to the Commission's current Telecommunications Services Priority (TSP) System rules for the legal basis for the proposed CPAS rules. The same authority relied on there is applicable here as well.

Action at the national level is necessary to ensure there is one uniform, nationwide cellular priority access scheme. Service providers should not have to undergo a confusing shift from a peacetime system administered by the Commission to a different wartime system administered by the Executive Office of the President under Section 706 of the Communications Act. Different systems would also entail purchases of different handsets to ensure compatibility. Exchanges by States of emergency personnel would be curtailed

without a uniform system. Much of the same rationale that led the Commission to adopt the TSP rules supports adoption of CPAS rules.

The proposed rules were not developed in a vacuum. Rather, they are the result of a collaborative process involving agencies of Federal, State and local government, service providers, standards organizations, and organizations representing emergency service providers.

The NCS believes that service provider liability concerns raised during consideration of these rules were adequately addressed by the Commission in the TSP proceeding. Liability should not be a problem if the CPAS rules are followed.

As with TSP, the rules establish five priority levels for NS/EP users. The rules differ materially from the TSP rules however in that State and local authorities are given priority levels equal to those given Federal authorities. This change recognizes that it is the local (and perhaps State) authorities who most frequently have "first responder" duties. As with TSP, it is proposed that the Executive Office of the President, through the NCS, provide the day-to-day administration of the system. At the request of participating State officials, it is proposed that a State could be an "authorizing agent", dealing directly with the NCS and without the necessity of obtaining a federal sponsor for a CPAS assignment. Cellular service providers would not be required to provide CPAS, but if they provided any form of cellular priority for NS/EP purposes, these rules would be mandatory.

In conclusion, these proposed rules represent a considered and appropriate response to the cellular spectrum access difficulties now being encountered by Federal, State and local NS/EP personnel.

In the Matter of:)
)
 Cellular Priority Access for)
 National Security and Emergency)
 Preparedness Telecommunications)

The Secretary of Defense, through duly authorized counsel, pursuant to Section 201 of the Federal Property and Administrative Services Act of 1949, 40 USC §481, and the memorandum of understanding between the Department of Defense and the General Services Administration dated November 27, 1950, hereby files this Petition for Rulemaking as Executive Agent of the National Communications System (NCS)¹. This Petition is filed

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pursuant to part 1.401 of the Commission's Rules and Regulations, 47 CFR part 1.401.

1. INTRODUCTION

This Petition seeks to have the Commission adopt rules which will authorize carriers to provide for priority access for cellular telephone services used for National Security and Emergency Preparedness (NS/EP) purposes. The term "priority access" means that in emergencies, when cellular spectrum is congested, the authorized priority user would gain access to the cellular radio spectrum ahead of cellular telephone users not engaged in NS/EP functions. The rules would be effective in circumstances which precede use of the President's war emergency powers contained in Section 706 of the Communications Act of 1934 (47 USC§ 606). Approval of the proposed rules will (1) authorize cellular service providers to provide priority access, (2) ensure that such service providers when doing so are not in violation of the ban in the Communications Act against unlawful discrimination or undue preference, and (3) override any existing contractual provisions inconsistent with the rules adopted.

This Petition and appended proposed rules have been approved by the NCS Committee of Principals (COP)² and the Executive Office of the President (EOP). Concurrently with the Commission's promulgation of the Cellular Priority Access Service (CPAS) rules, the EOP

participate in the activities of the NCS. The vast majority of the telecommunications assets of the 23 organizations are leased from commercial communications providers and serve the National Security and Emergency Preparedness (NS/EP) needs of the Federal government as well as State and local governments.

²The COP consists of representatives from those Federal departments, agencies, or entities designated by the President to participate in the NCS (NCS Bylaws, Art II, Sec 1). See previous footnote beginning on page 1 of this Petition.

will issue cellular priority access regulations and procedures applicable to Federal and other entities seeking cellular priority access for NS/EP telecommunications after invocation of the President's war emergency powers. Together, the Commission's rules and EOP regulations and procedures will ensure the implementation of a single CPAS applicable at all times.

The NCS, Petitioner, currently provides the administrative support for the Commission's Telecommunications Services Priority (TSP) rules found in Appendix A to Part 64 of the Commission's Rules and Regulations³. Those rules provide for priority restoration and provisioning of NS/EP circuits. As will be discussed in this Petition, the NCS proposes to administer the CPAS in much the same fashion as it administers the TSP rules. Because the proposed CPAS differs from the TSP rules in substantial degree, it is not possible that the current TSP rules could govern cellular priority access. Therefore, it is proposed that the Commission adopt an Appendix B to Part 64 to govern cellular priority access.⁴

2. THE NEED FOR THE RULES, BACKGROUND

Public use of cellular telephones has increased dramatically. More and more cellular

³National Security Emergency Preparedness Telecommunications Services Priority System, 3 FCC Rcd. 6650 (1988).

⁴Consideration was given to having the proposed rules be applicable to all wireless services, not only cellular. It is understood that a priority access (and egress) standard is being developed for Personal Communications Services. Wireless licensees, including PCS providers may wish to provide priority access to NS/EP subscribers. The current demand for cellular priority access for NS/EP purposes makes it prudent to proceed expeditiously with cellular priority access at this time. The Commission could decide to make these rules applicable to all wireless service providers which are able and willing to provide priority access for NS/EP telecommunications and avoid a potential future rulemaking proceeding.

telephones are being placed into service.⁵ Moreover, the inherent mobility of cellular technology provides incentives for its use when disasters occur. It is therefore critical that those with NS/EP responsibilities be able to utilize those phones to conduct response and recovery efforts. Without priority access to cellular spectrum, rescue workers fall victim to a recurring surge in cellular usage that has accompanied recent disasters. Circuits, both wireline and wireless, can become critically overloaded. Unless essential disaster response and recovery personnel can use their cellular telephones, lifesaving recovery efforts could be delayed. Priority access to cellular spectrum is essential in conducting response and recovery efforts.

Cellular usage in support of disaster response and recovery, and the problem that the congestion caused for emergency relief personnel, was highlighted during the recent tragedy in Oklahoma City on April 19, 1995. The first message the public heard from the city was, "Stop using your cellular phones." This message was necessary because the local response teams were having difficulty communicating while responding to the disaster and could have certainly benefitted from a cellular priority capability. Similar congestion occurred in disasters such as the World Trade Center bombing, the Loma Prieta earthquake, Hurricanes Hugo and Andrew, and other recent disasters.

It is recognized that standards for cellular priority access are still in the development

⁵"It has been estimated that by 1998 there will be 32 million cellular customers and 2.6 million Personal Communications Networks customers". In the Matter of Revision of the Commission's rules to ensure compatibility with enhanced 911 emergency calling systems, CC Docket No. 94-102, 9 FCC Rcd. 6170, 6172 (1994), citing *The Wireless Factbook*, Cellular Telecommunications Industry Association, Spring, 1994, page 36.

stage. As a result, no service provider is currently in a position to provide the priority access described herein. The Telecommunications Industry Association's TR45 cellular standards committee is addressing the priority access issue in its standards development work. The latest version of the Cellular Features Description standard has a service called Priority Access and Channel Assignment (PACA). PACA provides the queuing capabilities required by authorized NS/EP telecommunications users. The inter-system operation standards have been modified to accommodate the PACA feature as well. Industry members who have worked on this effort are now studying PACA's impact on the air interface portion of the network. The Time Division Multiple Access subcommittee has begun modifying its standards, and the Analog and Code Division Multiple Access subcommittees continue to study the impact issue. Petitioner has been advised that service providers who wish to provide cellular priority access should be in a position to do so by 1997.

3. THE COMMISSION'S AUTHORITY TO ADOPT THE RULES

The Commission has ample authority to adopt rules authorizing carriers to provide cellular priority access for NS/EP telecommunications. Attached hereto as Appendix A and incorporated herein is a legal memorandum setting forth the Commission's authority and responsibility to consider NS/EP telecommunications in its actions.

As a practical matter, one need look no further than the Commission's current Telecommunications Services Priority rules (Appendix A to Part 64) and the Report and Order which adopted them as precedent for the proposed rules.⁶ Significantly, in that Report and Order, the Commission addressed directly the question of its jurisdiction over intrastate

⁶See footnote 3 for citation.

service, which many cellular services are. The Commission stated:

It is NCS' position, and we agree, that the TSP System cannot be an effective mechanism for achieving national security emergency preparedness absent universal applicability. The Act requires that the FCC promote the safety of life and property and ensure effective communications for the purpose of the national defense. To the extent the goals of universality and national security - seminal features of responsive telecommunications used for the national defense- require preemption of state priority systems, we believe the Act is clear. ...(W)e are not taking any preemptive action now. The preemption of a state telecommunications priority would occur only in those cases where there is a direct conflict between national and state priorities for the use of the same intrastate facility or service. If a state assigned a lower priority than did NCS to an intrastate service or facility and refused to recognize the higher national priority, the conflicting priorities for that inseverable service or facility would confuse and impede the administration of an orderly, responsive national TSP system....Unless preempted by the national TSP system, the existence of conflicting state priority systems would undermine the goal of TSP and intent of Congress through Section 1 of the Act to promote the national defense. We therefore find that inclusion of intrastate services under Section 4(a)(1)(b) of the TSP rules represents a reasonable and necessary exercise of federal jurisdiction under Section 1 of the Act. 3 FCC Rcd. at 6652.

4. A SINGLE, UNIFORM NATIONAL SYSTEM IS ESSENTIAL

A. COMPATIBILITY BETWEEN PEACETIME AND WARTIME CELLULAR PRIORITY ACCESS SYSTEMS

Under authority contained in Sections 1, 4(i), 201 through 205, and 303(r) of the Communications Act of 1934, the Commission may permit the assignment of cellular access priorities for NS/EP purposes. The Commission's rules and regulations may be superseded, however, by the President's war emergency powers under Section 706 of the Communications Act. This section also authorizes the President to establish preferences or priorities with respect to commercially-provided telecommunications services essential to the national defense.

Pursuant to these authorizations in the Communications Act, the Commission and the

EOP have established the TSP system as the one uniform system of priorities for the restoration and provisioning of circuits with NS/EP traffic. (See 47 CFR Part 64, Appendix A, and 47 CFR Part 216, Appendix, NCS Directive 3-1.)

Executive Order 12472, *supra*, assigns to the Director of the Office of Science and Technology Policy (OSTP) the responsibility for directing the exercise of the war powers of the President under Section 706 of the Communications Act. To assist the Director, OSTP, in executing those functions, Executive Order 12472 directs the Manager, NCS to develop plans and procedures for the management, allocation and use (including the establishment of priorities and preferences) of Federally-owned or leased telecommunications assets. It is in part pursuant to this mandate that the Manager, NCS previously undertook the development of the TSP system and the now-proposed CPAS.

Effective NS/EP communications require compatible peacetime and wartime telecommunications cellular priority access. If the Director, OSTP, and the Commission were to develop and implement incompatible priority systems, NS/EP communications service users would be forced to change systems under the most serious of stress conditions, precisely when compatibility and ease of transition are most important.

Accordingly, while the Commission possesses the legal authority to promulgate whatever peacetime cellular priority access scheme it concludes is in the public interest, the NCS submits that compatibility with the wartime priority system, which would be employed by the President, is a significant factor in determining the public interest.

B. DIVERGENT SYSTEMS WOULD NOT BE IN THE PUBLIC INTEREST

Should the Commission not act to establish a uniform cellular priority access system,

there exists the possibility that there will be different systems in each state or even in various communities within a state. The states of Oregon and New York have already adopted legislation requiring cellular priority access. There will undoubtedly be other legislative initiatives, increasing the likelihood of diverse priority access schemes.

Having potentially 51 (or more) different priority access schemes (50 states and the Federal government plus, potentially, local) would prove totally unworkable. For example, Federal relief and disaster response personnel would be required to have cellular handsets compatible with all priority access schemes. State personnel and emergency utility crews called in to assist would not have priority access in other jurisdictions. Economic inefficiencies would result as equipment manufacturers were forced to provide the technology to meet the requirements of various priority access schemes. The same reasons that led the Commission to adopt a uniform set of rules for TSP apply here as well.

5. THE PROPOSED RULES ARE THE RESULT OF A JOINT EFFORT OF INDUSTRY AND FEDERAL AND LOCAL GOVERNMENTS

The National Security Telecommunications Advisory Committee (NSTAC) is a Presidential advisory committee under the Federal Advisory Committee Act. It consists of no more than thirty President-appointed members who have particular knowledge and expertise in the field of telecommunications and represent members of the nation's telecommunications industry. Typically, the member is the Chief Executive Officer of the company represented. At the request of the Deputy Manager of the NCS, NSTAC established its Wireless Services Task Force (WSTF) in 1990. The WSTF met with NCS-member agencies over a period of several months to provide information on emerging wireless technology and to explore the

Federal government's interest in utilizing such services provided on a commercial basis.

The government's strong interest led the WSTF to recommend that the government establish a focal point to ascertain the government's requirements and to ensure that appropriate standards would be developed by industry associations. As a result, the Federal Wireless Users Forum and the Federal Wireless Policy Committee were established. The need for priority access to the limited cellular spectrum in times of heavy demand was quickly identified as a critical requirement of NS/EP telecommunications.

The Chairman of the Federal Wireless Policy Committee requested the NCS take the lead in developing a priority access service. In cooperation with a subgroup⁷ of the NSTAC's Wireless Services Task Force, a series of meetings has been held to develop policies, rules and technical parameters of a cellular priority access service. Representatives from the following organizations have participated in those meetings: Wireless Services Task Force, the NCS, equipment manufacturers, cellular service providers, the Telecommunications Industry Association's TR45 Committee, the Cellular Telecommunications Industry Association, National Emergency Number Association, Association of Public Safety Communications Officers, National Association of State Telecommunications Directors, National Emergency Managers Association, American Red Cross, Oregon State Police,

⁷This is the Cellular Priority Access Subgroup referred to in the Comments of the Secretary of Defense in CC docket No. 94-102, filed January 9, 1995 (at pages 7,8) and in the Reply Comments of the Secretary of Defense in the same docket filed March 16, 1995 at pages 2 and 3. On page 5 of the Reply Comments, it is stated that the results of this subgroup's efforts would be presented in that docket. It was subsequently decided to initiate a separate Notice Of Proposed Rulemaking. All parties to CC Docket 94-102 are being served with a copy of this Petition.

Virginia Emergency Services, and representatives from California, Maryland, and Massachusetts.

The NCS cannot and does not represent that all of the participants agree with each and every aspect of the proposed rules. The views of all participants were considered however.

6. SERVICE PROVIDER LIABILITY

During the course of the discussions and meetings that have led to the proposed rules, several cellular service providers have broached the issue of liability potentially arising from CPAS operations. The NCS believes the Commission adequately addressed this issue in the TSP Report and Order. Therein, the Commission stated its belief that as long as the service provider was acting in accordance with FCC rules, it was shielded from liability. 3 FCC Rcd. at 6658.

7. SUMMARY OF THE PROPOSED RULES AND RATIONALE

The proposed rules are attached hereto as Appendix B. The rules are somewhat similar to the TSP rules contained in Appendix A to part 64. The TSP rules, however, provide the highest priorities for restoration and provisioning to Federal users alone. The proposed CPAS rules recognize that State and local emergency response personnel will likely be on the scene first. State and local interests are therefore given status at least equal to that of Federal authorities for access priorities.

The "Preliminary" section of the rules establishes a new section, 64-1401, specifically for cellular priority access. The comparable section for TSP is 64.401 which is amended to make clear that there are now to be two appendices to Part 64.

Section 1, Authority, provides the legal basis for the rules and explains their

relationship to the President's emergency war powers under Section 706 of the Communications Act.

Section 2, Background, sets forth the purpose of the proposed rules (2a) and to whom they apply (2b).

A description of CPAS is contained in Section 2c. It permits authorized NS/EP users to obtain access to cellular radio channels in times of congestion ahead of non-NS/EP users. The service would require no special activation and would be available at all times in equipped markets. It is not proposed that the provision of cellular priority access be made mandatory, only that licensees which elect to provide the service for NS/EP purposes do so under the provisions of these rules⁸. An authorized user would dial a feature code such as *"*XX"*. The precise code has not been selected by the standards organizations, but it should be a universal code. No authority to preempt connected calls is sought. The next available channel will go to the priority user at the top of the queue.

Section 2d provides definitions, incorporating where possible the definitions already found in Appendix A to Part 64. Three new definitions are provided. The term "authorizing agent" refers to the entity that makes the initial determination as to eligibility and forwards requests to the Executive Office of the President. Under the TSP rules, only Federal agencies may be "sponsors." Under CPAS, States may act as "authorizing agents." This change is being made at the specific request of the State and local participants. A "service provider" is defined as the cellular licensee, excluding agents and resellers. It is felt that only the

⁸Consistent with the TSP rules, service providers would insure that at all times a reasonable portion of cellular spectrum would be made available for public use. (See, 3 FCC Rcd. at 6677.)

licensee can control the software which incorporates the CPAS capability. The details of how customers of agents and resellers who have NS/EP responsibilities will be handled is being considered. A "service user" includes individuals and organizations. To be able to "go" when the emergency strikes, an organization should presubscribe to a number of cellular phones with priority access capability.

Section 2e assigns responsibility for CPAS administration to the Executive Office of the President, just as is done with the TSP system. The same office in the National Coordinating Center for Telecommunications will perform both functions.

Section 3, Responsibilities, defines the responsibilities of the Commission, the State and Federal authorizing agents, the Executive Office of the President, service users, service providers, and the TSP Oversight Committee. The role of the Commission is generally the same as for TSP. The authorizing agent's duties are consistent with having a single point of contact for the EOP. Except in extraordinary circumstances, the EOP will not contact the user directly, but go through the authorizing agent. In a State where there has been no authorizing agent designated and the proposed CPAS user can find no akin federal agency under EO 12656 (as in TSP), the EOP will act as an authorizing agent. The EOP is charged with enlarging the role of the TSP System Oversight Committee to provide oversight of CPAS as well. The Committee has agreed to this increased role. The responsibilities assigned "service users" and "service providers" are straightforward. Included among the responsibilities of the "service user" is the responsibility to pay for the priority service as may be billed. This reflects the Commission's statement in the TSP Report and Order that the

"...cost-causative user should be responsible for charges incurred...."⁹ Stated among the responsibilities of the "service provider" is that to "as technically and economically feasible, afford roaming service users the same grade of service provided local service users." It should be noted that there remain issues regarding roaming. It is believed that service providers will initially be able to afford priority queuing to users in a single Mobile Switching Center (MSC). Users would lose their places in line and have to start over again in a new MSC. Later, it may be possible to afford priority queuing between all of a licensee's MSCs in its licensed service area. Inter-system roaming may be possible, but not in the near term. The responsibilities assigned the TSP System Oversight Committee reflect its new, enlarged role to include oversight of CPAS as well as TSP.

Section 4, Appeals, establishes a mechanism for the resolution of disputes. The final authority is the Commission.

Section 5, CPAS Priority Levels and Qualifying Criteria, contains the essential elements of the petition. Therein the five priority levels are spelled out as well as the criteria for qualification for those priority levels. Note that State and local government officials are on an equal basis with Federal interests. This reflects the reality that it is local, and at times, State officials who will likely be the first responders to emergency situations. Federal (and State) officials will not likely be in the area at the outset (or maybe not at all, depending on the scope of the emergency). Thus, the proposed priorities and criteria effectively give local officials the highest priority in all categories in the immediate aftermath of a disaster. The highest level, priority 1, is reserved for high-level executive policy personnel, Federal, State

⁹3 FCC Rcd at 6661.

and local. Priority levels 2 and 3 are assigned to the "first responders." Priority level 4 covers stabilization functions, and priority level 5 provides for recovery functions.

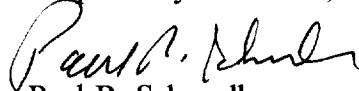
Section 6, Limitations, parallels similar language found in the TSP rules. To date, it has not been necessary to exercise that authority. It does give the EOP the authority to monitor assignments, assuring that no one category becomes overloaded.

8. Conclusion

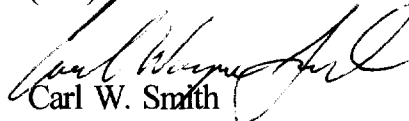
Commission action establishing the NS/EP Cellular Priority Access Service (CPAS) is vital to the efficient provisioning of cellular priority access for emergency response efforts. Significant legal authority and precedent exist for the Commission to establish such a priority system.

WHEREFORE, for the reasons set forth above, the Secretary of Defense, as Executive Agent of the National Communications System, respectfully requests that the Commission issue a Notice of Proposed Rulemaking proposing adoption of the rules appended hereto as Appendix B.

Respectfully submitted,



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LEGAL MEMORANDUM

A SYSTEM FOR PRIORITY TREATMENT OF NATIONAL SECURITY/EMERGENCY PREPAREDNESS (NS/EP) TELECOMMUNICATION SERVICES IS AUTHORIZED BY THE COMMUNICATIONS ACT OF 1934, AS AMENDED.

A. The Communications Act requires the FCC to take NS/EP concerns into account in its regulatory actions.

Section 1 of the Communications Act establishes that the FCC was created, in part, "for the purpose of the national defense." 47 U.S.C. Sec. 151. Since the enactment of that provision, the FCC has consistently recognized its duty to consider NS/EP concerns and goals when exercising its regulatory responsibilities. *See, e.g.,* The Consolidated Application of AT&T Company and Specified Bell System Companies, 98 FCC 2d 141 (1983); AT&T, 44 FCC 602, 605 (1955); Overseas Communications, FCC 78-155 (released October 26, 1978); Bendix Aviation Corp. V. FCC, 272 F.2d 533, 538 (D.C. Cir. 1959). In the MTS-WATS Market Structure Inquiry (73 FCC 2d 222, 230 (1979)), the FCC observed that satisfying national defense needs is a specific goal of the Communications Act. The FCC has also recognized that national defense considerations are properly a part of its decision-making process regarding Section 214 and 310(d) applications because its responsibilities under those sections are to ensure that the public interest, convenience, and necessity will not be adversely affected by the transfer of facilities and radio licenses. *See, e.g.,* AT&T, Northeast Corridor Lightguide Cable, 89 FCC 2d 1168, 1179 (1982). Moreover, to meet the needs of national defense and security, the FCC specifically tailored its decision establishing the existing

Telecommunications Services Priority System (TSP) which allows priority restoration and provisioning of certain critical government telecommunication services. *See, National Security Emergency Preparedness Telecommunications Services Priority System*, 3 FCC Rec. 6650 (1988). The FCC has considered the requirements of NS/EP in its evaluation of whether to impose limited joint planning requirements upon commercial carriers. *See, MTS and WATS Market Structure, Phase III*, 100 FCC 2d 860 (1985). The FCC has also given national security considerations weight in arriving at a facilities plan to meet Pacific telecommunication needs during the period from 1981 to 1995. *See, Inquiry to Be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs During the Period 1981-1995*, 100 FCC 2d 1444 (1985). Indeed, the FCC in part based its decision to allow the transfer of licenses and facilities from AT&T to the Bell Operating Companies (to implement divestiture) upon an assessment of the impact upon NS/EP. *See, The Consolidated Application of AT&T and Specified Bell System Companies*, *supra*, at 172. There, the FCC specifically found that the BOC's NS/EP response plan (i.e., the portion of the AT&T Plan of Reorganization stating the responsibilities of Bellcore NS/EP) would serve the public interest. Finally, the Commission's May 1986 Declaratory Ruling on the NS/EP Procedures Manual again noted that its defense responsibilities require all provisions of the Communications Act to be read in light of the national defense purpose of the Communications Act.

B. Legislative history evidences congressional intent to allow priority treatment of Federal government telecommunications services in the interests of national defense.

A review of legislative history of the Communications Act supports the conclusion that telecommunication service vendors should be allowed to provide call-by-call priorities

over the Public Switched Network.

Prior to enactment of the Communications Act of 1934, Senate Bill 2910 and House Rule 8301 were the bills introduced in the 73d Congress, 2d Session. They were intended to provide for the regulation of interstate and foreign communications by wire and radio.

Extensive hearings were held on the Senate Bill during March 1934. Hearings on S.2910 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. (1934). Captain S. C. Hooper, Director of Naval Communications, testified before the Senate Committee and suggested changes in three sections of the bill in order to protect more fully the interests of national defense. Hearings on S.2910, *supra*, at 160-173. Specifically addressing Section 1 of the Act, Captain Hooper stated:

Section 1 relates the purposes of the act. It expresses or should express the broad policy by which the Commission is to be guided in its decisions. One of the most potent factors which will operate either for or against our success in any future war is our vast system of internal and external wire, cable, telephone, and radio communications over which this Commission is now being placed in control. While the demands of national defense in time of peace affect our communications lightly, nevertheless, a firm foundation must be built within our communication companies on which our wartime communication structure may be placed swiftly and safely. The transfer of our commercial organizations from a peace to war basis cannot be accomplished in a month or even a year, unless the groundwork is carefully laid. The Communications Act of 1934 should recognize this fact and, to afford the members a complete statement of the general purpose of the act by which, in general their actions are to be guided, I suggest that in line 4, page 2, after the comma after the word 'charges' the words 'for the purpose of safeguarding these services and facilities in order that they may be utilized to best advantage in the interest of common defense.' *Id.* at 161.

Captain Hooper also presented to the Committee excerpts from a Joint Board of the Army and Navy which emphasized "that the communication system of the Nation is of vital importance to the national defense...."

Captain Hooper presented similar testimony before a House Committee in April 1934. Hearings on H.R. 8301 before the House Interstate & Foreign Commerce Committee, 73d Cong., 2nd Sess. (1934). Captain Hooper again proposed amending Section 1 of the bill to reflect a national defense purpose and presented detailed memoranda noting in part the need for a law properly addressing national defense. *Id.* at 20-21, 24, 41, 59-60. Major Roger Colton, Signal Corps, U.S. Army, also testified on behalf of the War Department before the House Committee and concurred in the Navy Department's recommendation. *Id.* at 100-101.

As a result of the Senate Hearings, a new bill, S. 3285, was introduced in the Senate. As contained in the bill, Section 1 of the Act described national defense as one of its purposes. That bill ultimately became the present law.

Both the FCC and courts of law have subsequently recognized the specific legislative intent to incorporate national defense concerns into the regulatory process created by the 1934 Act. In 1955 the FCC, in setting forth the purposes to be achieved by the Commission's regulatory activity, recognized Section 1 of the Act which includes its national defense purpose. AT&T, *supra*. See also, Overseas Communications, *supra*, at para 7. In the same proceeding, the Commission also indicated its awareness "of numerous clear and unequivocal expressions of Congressional intent, of which we hereby take judicial notice, that the highest priority must be given to the national defense and security interests of the nation." *Id.* In Bendix Aviation Corp. v. FCC, the court stated a similar view noting that "one of the prime purposes of the Act is "national defense." 272 F. 2d 533, 538 (D.C. Cir. 1959). Finally, as detailed above, the Commission recognized in the MTS-WATS Market Structure Inquiry, *supra*, that satisfying national defense needs is one of its specific goals as expressed in

Section 1 of the 1934 Act.

In addition to specifying its national defense purpose, the 1934 Act addresses the need for separate treatment of government telecommunication services. According to Section 201(b):

The communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeatd, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications.
47 U.S.C. Sec. 201(b). (emphasis added).

This language is identical to that submitted in 1934 in Senate Bills 2910 and 3285, and House Resolution 8301. However, the legislative history of the 1934 Act did not particularly address the intent behind allowing telecommunication services to be classified as "Government." Ultimately, between 1943 and 1947 extensive discussion concerning the meaning of Section 201(b) did occur and resulted in an amendment to the Act, permitting special government rates for telegraph service.

The effect of this amendment was to preserve preferential rates mandated by the Post Roads Act of 1866 for domestic telegrams from government departments and officials relating exclusively to public business. Sections 3 and 601 of the Communications Act of 1934 later established preferential government rates for all types of telegraph service. In 1943 Congress amended Section 3 to establish the priority of government telegrams over commercial traffic. At the same time, Congress rejected a proposed amendment to the 1866 Act which, in effect, would have eliminated the requirement for telegraph companies to charge the government less than commercial rates. Congress granted the FCC the authority to fix the level of these lower rates. H.R. Rep. No. 69, 78th Cong., 1st Sess. (February 1, 1943); and S. Rep. No. 13, 78th

Cong., 1st Sess. (January 18, 1943). As stated in the Conference Report, the result of this congressional action was to confirm that "[u]nder such section 201(b) the Commission may classify 'Government' communications as such, and prescribe rates therefor." Conf. Rep. No. 142, 78th Cong., 1st Sess. 15 (February 22, 1943).

Several other provisions of the Communications Act of 1934 evidence congressional intent that the Federal government may be given separate, and sometimes special, treatment. Section 4(j) authorizes the Commission to withhold publication of secret information affecting the national defense. Section 210(b) permits the Commission to authorize the provision of free service to the Federal government "in connection with the preparation for the national defense." Sections 214(b) and 222(c)(1) also require notice to certain government officials regarding various proposed carrier activities. Sections 305, 319(d) and 323 contain special provisions related to government-owned radio stations.

C. The existing Telecommunications Services Priority (TSP) System currently authorizes restoration and provisioning priority treatment for certain NS/EP telecommunication services.

Pursuant to the Communications Act, the FCC and Executive Office of the President (EOP) (acting through the NCS) have established the current TSP System as a uniform system of priorities for the restoration and provisioning, during emergency situations, of vital NS/EP telecommunication services. (See 47 CFR Parts 64 [Appendix A] and 216.2 for the rules and regulations governing TSP.) Such situations include major natural or man-made disasters and emergencies involving the national defense and security. In so doing, the FCC ordered common carriers to honor approved priorities and restore services according to the level of priority assigned to such service. The TSP system also includes for priority provisioning of new services, again utilizing a level of priority.

Read as a whole, the provisions of the Communications Act and their legislative history demonstrate that NS/EP considerations and Federal government telecommunication needs were intended to receive some separate and priority treatment within the regulatory framework established by Congress. It should be noted that the two major bills regarding telecommunications awaiting final action (HR 1555 and S 652) do not affect this conclusion.

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